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Supreme Court Case No. 063269

IN THE SUPREME COURT OF WEST VIRGINIA

LANDIS V. LANDIS

A.E. LANDIS,

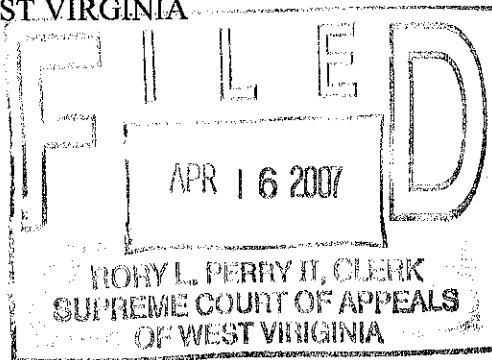
Petitioner below,

vs.

CASE NUMBER: 99-D-531
JUDGE ROBERT A. BURNSIDE, JR.
CIRCUIT COURT OF RALEIGH COUNTY

GEORGANNE BANNING LANDIS,

Respondent below.



FROM THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

**MEMORANDUM OF LAW IN SUPPORT
OF RESPONDENT'S PETITION FOR APPEAL**

April 16, 2007

Lyne Ranson
Lyne Ranson Law Offices, PLLC
WV State Bar No. 3018
1528 Kanawha Boulevard, East
Charleston, WV 25311
(304) 344-2121

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

NATURE OF PROCEEDINGS AND RULINGS IN TRIBUNAL BELOW

Divorce proceedings were initiated in 1999, with a temporary hearing held on November 13, 2001 and the Temporary Order being entered on January 16, 2002. The parties were married on October 17, 1987 and are the parents of two children, Juliette Landis (currently age 16) and Reid Landis (currently age 15). Numerous hearings have been held by the Family Court to address issues of contempt, production of documents, parenting issues, child support, spousal support and equitable distribution. The parties are owners of several businesses in Raleigh County and real estate in West Virginia, Massachusetts and Maryland. The Respondent, A.E. Landis is a physician, specifically an Orthopedic Surgeon in the Beckley, West Virginia area. A Bifurcated Order was entered divorcing the parties on the ground of living separate and apart for more than one year on March 25, 2002.

On August 30, 2004, the parties reached an agreement on certain issues including: payment of spousal support, child support, payment of private schooling and tuition for the children and a division of the parties' personal property and many personal (not business) real estate holdings. The parties placed their agreement on the record during proceedings before the Family Court, who approved and ratified such settlement. The Final Order was entered on October 7, 2005 (*Nunc Pro Tunc* to August 30, 2004) divorcing the parties, distributing certain marital property, and determining child and spousal support.

On October 18, 2005, the parties reached an agreement on the remaining equitable distribution issues including values and distribution of the parties' businesses, retirement and other financial accounts, money market accounts, life insurance and other property issues. The parties

placed their agreement on the record during proceedings before the Family Court, who approved and ratified such settlement. A Final Order was entered on April 24, 2006 addressing the remaining marital property, including businesses and certain accounts.

The remaining and only issue that was to be addressed by this Honorable Court was payment of Ms. Landis' attorney fees, expert fees and costs.

The Family Court sent a letter to counsel dated March 3, 2006 denying Ms. Landis' request for attorney fees, expert fees and costs and instructed Dr. Landis' counsel to draft an Order reflecting such ruling. Counsel for Ms. Landis filed a Motion to Reconsider such ruling on or about March 29, 2006. An Order was entered on April 24, 2006 denying Ms. Landis' attorney fees, expert fees and costs request.

STATEMENT OF FACTS

This divorce proceeding was initiated in 1999 by Dr. Landis. Dr. Landis filed his Petition for Divorce on the ground of irreconcilable differences. Ms. Landis filed her counter petition on the ground of adultery. The parties have spent over seven years attempting to finalize all issues in this matter. As of the date of filing this Petition, Dr. Landis has not paid Ms. Landis her equitable share of the parties' marital estate. Two contempt petitions have been filed regarding his non-payment of such. The initial payment was due in full to Ms. Landis in December, 2005 and Dr. Landis has failed to abide by the Final Order requiring him to do such. Ms. Landis filed a Petition for Contempt for his non-payment of such and a hearing was held on June 6, 2006 where Dr. Landis was Ordered to pay Ms. Landis one-half of the amount owed to her within 30 days from the June 6, 2006 hearing date and for him to pay the remaining funds within 30 days from the date 3 Curlew, Nantucket, Massachusetts property and 318 Perry Cabin Drive, St. Michaels, Maryland properties were refinanced. The Court Ordered Ms. Landis to refinance in her name certain

properties she received, specifically, 318 Perry Cabin Dr., St. Michaels, Maryland and 3 Curlew Court, Nantucket, Massachusetts. On June 27, 2006 Ms. Landis refinanced 318 Perry Cabin Drive, St. Michaels, Maryland and on July 28, 2006, she refinanced 3 Curlew Court, Nantucket, Massachusetts. Dr. Landis failed to pay Ms. Landis any of monies due and owing to her. A second Petition for Contempt was filed and a hearing was held on October 16, 2006 wherein the Court Ordered that Dr. Landis must pay such amount in full by December 15, 2006. This is just one example of Dr. Landis' non-compliance with the Family Court's Orders and the reason that this matter has gone on for seven (7 1/2) years.

Ms. Landis initially retained the services of James Cagle as her attorney wherein she paid \$3,500 to him in legal fees. Mr. Cagle was not able to continue in the case due to his heavy case load. Ms. Landis currently owes Mr. Cagle \$5,999.20 for attorney fees and costs. Therefore, Ms. Landis then retained Barry Bruce and charged Ms. Landis \$32,660.19 in attorney fees. Ms. Landis decided to terminate Mr. Bruce's services in large part, because he was not able to obtain the requested and necessary financial information from Dr. Landis' counsel and financial expert. Ms. Landis' current balance due to Mr. Bruce is \$1,566.14. Ms. Landis retained the services of Lyne Ranson to represent her for the remainder of her divorce case in or about the summer of 2002. Ms. Ranson's invoice for legal services rendered shows the amount of legal fees to be \$129,280.17. Ms. Landis has paid \$110,000 of the total fees leaving a balance due of \$19,280.17.

Ms. Landis' financial expert, Marvin Kuperstein had serious health problems and retired during the course of Ms. Landis' divorce which was in or about late 2002. Mr. Kuperstein's invoice shows the current amount due to him of \$111,025. To date, Ms. Landis has paid \$2,500 to Marvin Kuperstein toward his outstanding invoice. After Mr. Kuperstein's retirement and health problems, Ms. Landis was required to retain the services of Daniel Selby as her financial expert and to value the

parties' businesses and assist in determining an appropriate equitable distribution. Mr. Selby's invoice for his services rendered shows the total expert fees is \$31,950. Ms. Landis has paid \$18,250 of Mr. Selby's fees leaving a balance due of \$13,700.

ASSIGNMENTS OF ERROR

In the Order affirming decision of the Family Court Judge entered on July 20, 2006 by the Circuit Court and the final Order entered on April 24, 2006, the Court erred as follows:

- 1. That the Circuit Court erred by not remanding, nor reversing the family court judge's decision to not award a full or partial reimbursement to Ms. Landis for attorney fees, expert fees and costs incurred by her for the prosecution of this divorce matter, since this was a very complex case, Dr. Landis's misconduct led to the dissolution of the parties' marriage, there was a substantial disparity in income, he failed to provide documentation in a timely manner, and Ms. Landis did not have the financial ability to pay such fees.**
- 2. That the Circuit Court erred by not remanding, nor reversing the Family Court's finding that Ms. Landis received an award of substantial assets when, in fact Dr. Landis failed to pay almost \$900,000 that was due and owing in December 2005 and Ms. Landis' other marital assets did not produce much income.**
- 3. That the Circuit Court erred by not remanding, nor reversing the Family Court's decision that Ms. Landis had the ability to pay her own attorney fees when she was not currently employed and has not been for the last 15 plus years, her spousal support will terminate in approximately 2 ½ years and she suffers from health problems which preclude her from earning an income.**
- 4. That the Circuit Court erred by not remanding, nor reversing the Family Court's ruling that Dr. Landis was making payment on a \$15,000 mortgage loan for Ms. Landis'**

benefit for her prior attorney fees when that is not the evidence contained in the record.

5. That the Circuit Court erred by not remanding, nor reversing the decision of the family court in finding that Dr. Landis had paid \$1,500 to Barry Bruce for attorney services rendered to Ms. Landis, when in fact the evidence did not support that he had paid that.

DISCUSSION AND AUTHORITIES

Pursuant to WV Code Section 51-2A-14, the Circuit Court shall review the findings of fact made by the family court judge under the clearly erroneous standard and shall review the application of law to the facts under an abuse of discretion standard. The standard of review by the appellate court is as follows: findings of fact not supported by competent evidence are to be reversed, conclusions of law are reviewed de novo, and the lower court's discretion is evaluated for potential abuse. Mitchell v. Mitchell, 205 W.Va. 203, 517 S.E.2d 300 (1999). Further, conclusions of law rendered by the lower court are not accorded any specific weight, and should be reversed when incorrect. Foster v. Foster, 196 W.Va. 341, 472 S.E.2d 678 (1996).

Underlying Facts

Ms. Landis' divorce case took **over 7 years before a final agreement** on all issues could be reached; and the case is still not completed because Dr. Landis would not hold up his end of the agreement by paying Ms. Landis. Every issue of the divorce case was contested. Ms. Landis' attorneys made numerous requests for financial documents of the parties' businesses and accounts. In some instances it was more than 4 years before Ms. Landis could receive critical documentation from Dr. Landis and his agents to properly value the marital estate, such as providing supporting documentation showing the values of retirement accounts, life insurance policies, tax returns, bank records, income information and so forth. They did not produce such information in their financial

statement, nor discovery requests. The parties owned many business interests, several homes in three states and numerous pieces of property which were marital property. There was also a substantial amount of other assets which were separate with possible marital interest or appreciation to be determined. Furthermore, the parties were owners of numerous banking accounts, pension accounts, IRAs and other accounts of this nature. Dr. Landis had approximately 22 life insurance or disability policies, which had to be researched to determine their cash value or any value associated therein, whether the policy was transferred, removed or allowed to lapse. These accounts had to be traced to determine what happened to the accounts and the monies in said accounts.

Numerous subpoenas were issued in an attempt to receive documentation to support the values and debts in the equitable distribution worksheet since Dr. Landis did not provide such in a timely manner. Dr. Landis' disregard and non-responsive attitude for such requests caused Ms. Landis to incur more costs to obtain necessary documents. Ms. Landis incurred litigation costs for subpoena requests, subpoena service, document copying, research from 3rd parties and other necessary litigation costs totaling \$14,962.16.

In some instances, Ms. Landis did not receive any updated documentation on the assets and debts to provide the information needed as the divorce continued for years. Therefore, Ms. Landis had to depose Dr. Landis and John Stroud for the second time. The first time Dr. Landis was deposed, the attorney allowed John Stroud to appear with Dr. Landis and provide answers. The depositions of William Kinder, Lisa Stroud, Mark Collins and Mike Bass were taken in 2005 to obtain the information needed to finalize this matter. These depositions were held on August 2, 2005, August 3, 2005, August 31, 2005 and September 1, 2005. This matter was settled approximately 47 days from the date of Dr. Landis' second deposition held on September 1, 2005. Had Dr. Landis been forthcoming with the requested documentation and other information necessary to finalize this

matter, it would probably not have taken so many years to conclude this divorce proceeding.

Misconduct by Dr. Landis

Furthermore, Dr. Landis' relationship with the X-Ray Technician employed in his office led to the deterioration of the parties' marriage. Dr. Landis filed for divorce in August 1999. Ms. Landis did not want a divorce from Dr. Landis, nor did she want to break up her family unit. Ms. Landis was a full-time mother and companion to Dr. Landis. It was devastating for Ms. Landis to learn of Dr. Landis' relationship with his married, X-Ray Technician.

However, in spite of learning this, Ms. Landis did want to attempt to work out the marriage. It was Dr. Landis who decided he did not want to be married to Ms. Landis and to hurt his children by moving from the marital home to be with his girlfriend. Not only were Dr. Landis' actions devastating to Ms. Landis and their children, but another marriage was ended due to such disregard of Dr. Landis and his girlfriend. Ms. Shleser filed for divorce in July, 1999. Both Dr. Landis and Samantha Shleser denied the extramarital affair occurred during Ms. Landis' and Dr. Landis' marriage and continued to deny such in their depositions taken on August 31, 2005 and September 1, 2005. Copies of the depositions of Dr. Landis and Samantha Shleser have been filed with the Court for review. Dr. Landis and Ms. Shleser are currently engaged and have been engaged for over a year. Furthermore, Ms. Shleser is still employed as Dr. Landis' X-Ray Technician.

**STANDARDS TO BE APPLIED IN THE AWARD
OF ATTORNEY FEES, EXPERT FEES AND COSTS**

The award of attorney's fees and costs in divorce proceedings is authorized by West Virginia Code Sections 48-1-305 and 48-5-611 which allow costs to be awarded to either party as justice requires and in all cases the court, in its discretion, may require payment of costs at any time, and may suspend or withhold any order until the costs are paid and that the court may compel either party

to pay attorney's fees and court costs reasonably necessary to enable the other party to prosecute or defend the action in the trial court. Bettinger v. Bettinger, 183 W.Va. 528, 396 S.E. 2d 709 (1990). An award of fees and costs rests initially within the sound discretion of the Family Court Judge. Banker v. Banker, 196 W.Va. 535, 474 S.E. 2d 465 (1996) and Chafin v. Chafin, 505 S.E. 2d 679 (1998).

In determining whether to award attorney's fees, the family law master should consider a wide array of factors, including the party's 1) ability to pay his or her own fee, 2) the beneficial results obtained by the attorney, 3) the parties' respective financial conditions, 4) the effect of the attorney's fees on each party's standard of living, 5) the degree of fault of either party making the divorce action necessary, and 6) the reasonableness of the attorney's fee request. Rogers v. Rogers, 197 W.Va. 365, 475 S.E.2d 457 (1996), Syllabus Point 4, in part Banker v. Banker, 196 W.Va. 535, 474 S.E.2d 465 (1996).

Where an attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and the client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Aenta Casualty & Surety Co. v. Pitrolo, 342 S.E.2d 156 (W.Va. 1986), Rice v. Mike Ferrell Ford, Inc., 403 S.E.2d 774 (W.Va. 1991)

In the Smith case, the Court held that such an award of attorneys fees could be obtained through all stages of the proceedings. The Court stated the “**touchstone of the award is that one spouse has a significantly higher income than the other**”. Smith v. Smith, 187 W.Va. at 650.

Further, as other factors for review in making a decision on an award of attorneys fees, our court has approved a determination of whether one party received **assets that were more liquid** than the other assets received by the other and the **relative fault of the parties** in the deterioration of the marriage. Hillberry v. Hillberry, 466 S.E.2d 451 at 457-458 (W.Va. 1995).

The Court stated that the principal inquiry in determining whether to compel a party to pay the attorney fee for the other party is whether the **financial circumstances** of the parties dictate that the award of attorney’s fees is necessary. In Langevin v. Langevin, 187 W.Va. 585, 590, 420 S.E.2d 576, 581 (1992) the Court held that the decision regarding payment of attorney’s fees is to be made on the basis of a **party’s financial resources and ability to pay**. Additionally, we have held that the “[t]he touchstone of the award is that **one spouse has a significant higher income** than the other.” Smith v. Smith, 187 W.Va. 645, 650, 420 S.E.2d 916, 921 (1992) (per curiam).

APPLICATION OF THE BANKER FACTORS

1. **Ability to Pay:** Ms. Landis should not be responsible for full payment of her attorney fees out of the funds she is to receive as equitable distribution of the parties’ assets and debts; which she did not receive when she was supposed to. She will have no other source of income for the duration of her life, except as **may be** derived from this money. Certainly, given the volatility and uncertainty of the stock market and other speculative investments, it is not a guarantee that any additional money will be made from this sum. Furthermore, the remaining assets Ms. Landis received are mostly non-liquid, non-income producing assets. Ms. Landis receives \$10,000 per month in spousal support pursuant to the final order entered on October 7, 2005 until September 1, 2009 (less

than 2 ½ more years) from which a significant portion will be spent paying taxes and covering her living expenses. Dr. Landis was ordered to pay all existing mortgages, utilities, taxes and insurance on all properties until August 30, 2004.

Due to the refinancing by Dr. Landis of the St. Michaels property into his name individually, before the parties division of marital assets, Dr. Landis's new bank did not include the taxes and insurance in the new payment of \$1,900 which was deducted from Ms. Landis's spousal support each month. When the bank realized that they were suppose to pay for the taxes and insurance for such home, the bank paid the amount of back taxes and insurance due and then charged Dr. Landis \$4,000 per month for one year for the back tax payments of the years 2003, 2004, 2005 and until July 2005, when Ms. Landis refinanced such property into her name solely. Dr. Landis should not have deducted the full amount of such payments from Ms. Landis's spousal support payment during that period since he was responsible for the payment of all mortgages, homeowners insurance, and taxes from the time of the temporary hearing through August 31, 2004, the date when the parties' reached their agreement regarding the division of real estate. Furthermore, Ms. Landis was unaware that Dr. Landis refinanced such property and did not sign any documentation allowing the refinance to occur.

Due to Dr. Landis' non-payment of the equitable distribution owed to Ms. Landis, she was forced to refinance the home in St. Michaels, Maryland and the home in Nantucket, Massachusetts for a higher interest rate since she could not use the equitable distribution money as collateral or to pay off her credit card debt. Dr. Landis has continued to have the ability to increase his earnings on such amount by trading and selling stocks as well as receiving distributions from his E-Trade accounts. Ms. Landis has lost a year of interest on such money as well as the use of such money.

Ms. Landis, unlike her husband, Dr. Landis will not enjoy the future benefit of recurring income from the medical practice and businesses. Due to certain physical conditions of Ms. Landis,

including, Type I Diabetes, arthritis in both knees, degenerative disc and joint disease, 4 collapsed discs (2 in her neck area and 2 in her lower back) which cause Ms. Landis pain and difficulty in moving. Furthermore, Ms. Landis has been out of the workforce for nearly 20 years. Ms. Landis does not have the ability to be employed, but would have to live on the proceeds and raise her children from this settlement for the rest of her life. Also, Dr. Landis, as a result of this divorce proceeding received his medical practice, numerous businesses and numerous retirement accounts, 401(k), IRAs, E-Trade accounts, a \$250,000 annuity and many other assets. Dr. Landis also purchased 2 new shotguns for investment which cost \$30,000 each plus another less expensive shotgun with the funds he received from his profit sharing plan with Jackson & Kelly that he transferred to an E-Trade Account against the Court's Order. At the time of separation, August 1999, Dr. Landis' profit sharing plan had over \$1,500,000 in such account. Dr. Landis chose to make numerous withdraws from this account after the parties' date of separation and then at some point after May, 2004, Dr. Landis removed the remaining monies in this account, against the Court's Temporary Order entered January 16, 2002 which enjoined and restrained him from disposing of or encumbering any assets during the pendency of this proceeding and he transferred the monies into an E-Trade Account and put \$250,000 in an annuity. Furthermore, Dr. Landis has a life insurance policy naming all of his children as beneficiary in the amount of \$1,000,000.

Ms. Landis' \$10,000 per month spousal support for the next 2 ½ years will be taxed, reducing it by nearly half of that sum. There were disclosures filed showing that the some of money that Ms. Landis needed to maintain a semblance of her previous standard of living and pay her monthly expenses exceeded the amount of monthly alimony she now receives, leaving her with little money, if any for discretionary use. Ms. Landis pays the mortgages, insurance, taxes, utilities and maintenance for the homes she received in the parties' divorce settlement.

Ms. Landis received *non-income* producing properties which are not to be considered when determining ability to pay her own fees as the Court held in Stewart v. Stewart, 550 S.E. 2d 86 (2001).

Similarly in this case, the assets Ms. Landis received do not provide for the payment of attorney's fees. Through equitable distribution, Ms. Landis received mostly non-income producing assets consisting of the home where she resided in St. Michaels, Maryland, one (1) home located in Nantucket, Massachusetts which is rental property with a mortgage. However, this property barely pays for itself after deducting expenses. Ms. Landis has other real estate that is her separate property located in Nantucket, Massachusetts as well as Chevy Chase, Maryland which only pay for themselves, without producing income.

On the other hand, Dr. Landis received not only his share of the marital furnishings, his many businesses, including gas stations, convenient stores and car washes that are situated on very valuable land that continues to increase in value, his medical practice, vehicles, but also his E-Trade Accounts, having close to one (1) million dollars, a \$250,000 annuity and numerous other accounts of this nature. In fact, Dr. Landis has had "total and complete access to all income" received by the businesses from the date of separation during the course of the litigation. The illiquidity of Ms. Landis' assets demonstrates that she does not have the resources available to meet her litigation costs and fee obligations.

It seems likely that Dr. Landis has the ability to add a substantial amount to his assets from his companies, medical practice and other sources. Dr. Landis' income tax returns reflect income from his practice in the amount of \$690,000 to \$618,000 for the year 2000 to 2003. Ms. Landis will have to depend on the limited funds received in her settlement to live on and support her for the rest of her life. As noted above, the majority of her assets are not income producing. She received real estate,

personal property, and vehicles.

Ms. Landis possesses no real work skills and does not anticipate having any future income. She suffers from medical conditions and has since the parties' marriage including, Type I Diabetes, arthritis in both knees, degenerative disc and joint disease, 4 collapsed discs (2 in her neck (cervical) area and 2 in her (lumbar) lower back which make it difficult for her to walk and to stand up at sit down at times and it renders her unable to work full-time or receive any significant income. Therefore, her ability to pay these fees is significantly limited. Ms. Landis' spousal support payments will end in less than 2 ½ years. When this occurs, she will be forced to live on and eat up the residue of her marital estate.

2. **The Amount Involved and the Results Obtained:** As discussed herein, Ms. Landis' attorneys and financial experts achieved more than reasonable success based on the merits of her case.

3. **The Skill Required to Perform Legal Services Properly:** At the risk of being repetitive, this was a complex case that required above average skills to represent the parties. Legal services of average or below quality would most likely not have achieved the same result. Ms. Landis' attorneys' extensive experience in litigation and family law was noted herein.

4. **The effect that payment of attorney fees would have on each parties' standard of living:** While both parties left the marriage with approximately 1.5 million in assets accumulated during the course of their marriage, Dr. Landis **alone** will continue to reap substantial recurring income from his businesses. Dr. Landis' income via the businesses and practice for the previous years was over \$500,000 to \$600,000 even with huge tax deductions and tax losses. There is no reason to believe that Dr. Landis' income will not continue to reflect, if not exceed this pattern.

On the other hand, Ms. Landis' spousal support will conclude on September 1, 2009 pursuant to the Final Order entered on October 7, 2005. Therefore, relative to each other, Dr. Landis would

be better financially suited to pay the fees and costs at issue. Considering taxes, fees and costs, this would consume a substantial portion of Ms. Landis' spousal support to be received, with no opportunity for her to recoup this in the future.

Ms. Landis has had to pay her attorney fees and costs during this over 7 ½ year proceeding from her retirement account and other equitable distribution sources. Ms. Landis has no monies left in her retirement to pay her attorney fees, expert fees and costs.

Clearly, requiring Ms. Landis to pay nearly half of her total settlement for fees and costs, especially when, as discussed herein, she was the wronged party, would be inequitable and would impair her ability to even come close to maintaining the standard of living she and the children were accustomed to prior to separation.

It is unknown what the amount of Dr. Landis' legal expenses were and where such expenses were paid from. Dr. Landis is in a better financial position to pay Ms. Landis' attorney, expert fees and costs because of his significant capacity for income in the future, as well as from interest income, all of which Ms. Landis will not share.

5. The "Degree of Fault" by either party in making the divorce action necessary.

Dr. Landis filed the Divorce Complaint in August, 1999. To this date, Dr. Landis has not admitted that he engaged in an adulterous relationship with his X-Ray Technician and that his behavior was the significant contributing factor to the deterioration of the marriage. It is clear that Ms. Landis had no fault, nor did she engage in any behavior that caused or led to the divorce. Furthermore, it is Dr. Landis who initiated this divorce proceeding and abandoned Ms. Landis for him to be with his X-Ray Technician. At that time, the X-Ray Technician was married and has since divorced so that she could have a romantic relationship with Dr. Landis. She filed for divorce in July, 1999, one month before Dr. Landis. Thereby, Dr. Landis' actions left Ms. Landis with no choice but

to vigorously defend herself and her interest in the marital assets, her entitlement to spousal support, as well as litigate a number of other issues. As previously stated, Dr. Landis and Ms. Shleser are engaged.

This case was a classic example of the Banker Court's instruction that *fault must be considered and given appropriate weight* when deciding who pays the fees and costs.

The evidence is sufficient to support a finding that this marriage would not have been dissolved, but for Dr. Landis' continued affair with his X-Ray Technician. Furthermore, the evidence in this case revealed unequivocally that Ms. Landis entered this divorce proceeding with clean hands. All evidence points to the fact that Ms. Landis was an excellent wife and mother. In divorce cases, the "fault" factor is premised upon the notion that it is unfair to force a litigant to pay for the cost of litigation that is wholly caused by the misconduct of the opposing party. See, 196 W.Va. at 550. (Emphasis added)

Here, as in Banker, this litigation, and its associated costs, was wholly caused by Dr. Landis' misconduct. To require Ms. Landis to pay attorney fees, expert fees and costs for the price of achieving equity from a marriage which she did not want to end is a penalty that this Court appropriately decided not to impose upon her.

While it appears that the agreement resulted in some relative financial parity in the distribution of marital assets (only if one includes non-income producing assets), and that Ms. Landis now may have the raw fiscal ability to pay her fees, the Court in Burnside made clear that it is improper to narrowly focus on that issue alone. Rather, the Court must consider "all the appropriate factors, including the fault of (Dr. Landis)". Burnside, 196 W.Va. at 550. Regardless of the temptation to require each party to pay his or her own fees from the considerable assets at their disposal, Burnside reminds "... that it is unfair to force a litigant to pay for the cost of litigation that is wholly caused by

the misconduct of the opposing party". Ibid.

6. The Attorney Fees, Expert Fees and Costs in this case are Reasonable.

The reasonableness of Ms. Landis' litigation costs has been discussed herein as far as her attorney fees, expert fees and costs in the amount of \$333,442.86.

Ms. Landis' financial expert, Marvin Kuperstein retired during the course of Ms. Landis' divorce which was in or about late 2002. Mr. Kuperstein was suffering from health problems that forced his retirement. Mr. Kuperstein's fees were \$111,025. After Mr. Kuperstein's retirement, Ms. Landis was required to retain the services of Daniel Selby as her financial expert and to value the parties' businesses and assist in determining an appropriate equitable distribution. Mr. Selby's total expert fees was \$31,950.

The other remaining expenses that Dr. Landis should be ordered to reimburse Ms. Landis for include costs for copying and research for bank and financial institution fees, costs for obtaining life insurance documentation as well as costs for documentation of the numerous accounts such as pension, IRAs, money market accounts and other accounts of this nature since Dr. Landis did not produce these requested documents in their entirety, as well as transcripts and depositions' fees and copying costs for preparing massive exhibits. Ms. Landis had 50 plus exhibits (with multiple pages and attachments) to present to the family court judge had this matter gone to evidentiary hearing.

THE 12 AETNA FACTORS

1. **The Time and Labor Required:** Ms. Landis' counsel submitted various invoices showing the many hours of work which was necessary to bring this matter to a satisfactory conclusion. It is unknown what hours Dr. Landis' attorney and financial expert have billed and also not billed Dr. Landis for their representation. Dr. Landis' financial expert was also his business partner, tax advisor, tax preparer, and friend; thereby, most likely not billing Dr. Landis for the full

extent of his assistance in this matter. Since this case was complex, protracted and contentious this Honorable Court should not be surprised at the number of hours worked by counsel on either side. Clearly, Dr. Landis has substantial business and marital interests which he sought to preserve and which his counsel fought vigorously to keep out of the marital hotchpot. Ms. Landis' counsels' efforts to capture an interest in the businesses were just as trenchant and time consuming, as one would expect from skilled counsel.

2. **The Novelty and Difficulty of the Questions:** This case was more difficult than the average divorce case due to the extent and nature of the disputed marital assets, as well as the advanced complex of theories put forth. Dr. Landis had numerous business interests in which Ms. Landis had, at least an arguable interest due to theories as determined by Ms. Landis' financial expert. Every family law matter imaginable was at issue and hotly disputed in this case including: equitable distribution, what constituted separate property, whether appreciation or separate property was active or passive, the value of marital business interests, spousal support and the nature and length of such, child custody, parenting time with the children, proper amount of child support, payment of extra curricular activities and schooling for the children, adultery by Dr. Landis, misconduct by Dr. Landis, medical coverage for Ms. Landis repairs to the numerous homes and vehicles, many costly commercial and residential appraisals, and the list could continue on and on. Ms. Landis' attorney fees, expert fees and costs totaled \$333,442.86.

3. **The Skill Required to Perform Legal Services Properly:** At the risk of being repetitive, this was a complex case that required above average attorney skills to represent the parties. Ms. Landis' counsel in this case has been an attorney for over 24 years and 11 months, a former Circuit Judge, a trial instructor for many years at West Virginia University College of Law Trial Advocacy Program, taught Family Law in the University of Charleston paralegal program, and was a

former Assistant U.S. Attorney. Ms. Landis' counsel's practice now consists almost exclusively of family law in a number of counties statewide. The other attorneys for Ms. Landis in this matter were James Cagle (also very experienced in Family Law) who has practiced for many years. Barry Bruce has been an attorney for over 24 years and practices family law on a regular basis as well.

4. **The Preclusion of Other Employment by the Attorney Due to the Acceptance of this Case:** This case did not preclude Lyne Ranson, Ms. Landis' attorney from accepting other cases. However, it did interfere with counsel's ability to personally appear and earn a fee at numerous motion and temporary hearings in other matters. Because of the nearly around the clock work Ms. Landis' attorney performed in the last months and weeks before *each* final hearing scheduled in this matter, Ms. Landis' counsel had to direct an associate to take over several cases which she had specifically worked on and was retained to specifically work on. Ms. Landis was unable to retain an attorney in the Beckley, West Virginia area due to Dr. Landis' position in the community. Mr. Cagle's hourly rate is currently \$250 per hour. Mr. Bruce's hourly rate is \$200 per hour.

5. **The Customary Fee:** It is unknown if counsel's hourly rate of \$200 is being contested as unreasonable by Dr. Landis. However, this is an appropriate fee in this type of case for such experienced counsel. Furthermore, some attorneys charge up to \$250 per hour for complex divorce cases. Furthermore, Ms. Landis entered into a retainer agreement with counsel agreeing to pay \$200 per hour for representation in divorce proceedings and any appeal hereafter.

6. **Whether the Fee is Hourly or Contingent:** The fee here was hourly, so this factor is not relevant.

7. **The Limitations Imposed by the Client or the Circumstances:** This factor has been dealt with in item 4 above.

8. **The Amount Involved and the Results Obtained:** Ms. Landis' attorney and financial

advisor achieved more than reasonable success on the merits of Ms. Landis' case. With counsel's assistance, Ms. Landis received \$10,000 per month in spousal support until September 1, 2009 and a \$5,000 in child support as well as \$400 per month for Ms. Landis to pay the premium for her health and medical insurance coverage until such time as the youngest child has reached the age of 18 and graduates high school. Also, Dr. Landis agreed to pay for the children's private schooling and costs associated with such.

9. **The Experience, Reputation and Ability of the Attorneys:** Both Dr. and Ms. Landis were represented by competent counsel who regularly appear in Family Court for complex cases.

10. **The Undesirability of the Case:** Ms. Landis could not get a local attorney to represent her because of her husband's position and work in the community. Dr. Landis works closely with numerous attorneys in the Beckley, West Virginia and surrounding areas through Workers Compensation and other insurance related legal cases. Several attorneys including two large firms would not accept Ms. Landis' divorce case in the Charleston, Lewisburg and Beckley, West Virginia areas since there was a conflict of interest. A prominent Beckley attorney would not take the case because Dr. Landis operated on him.

11. **The Nature and Length of the Professional Relationship With the Client:** This factor was not relevant.


12. **Attorney Awards in Similar Cases:** As for total fee awards, the most published and widely cited case on the issue is Chafin v. Chafin 202 W.Va. 616 505 S.E.2d 679 (1998) in which the total fees were over \$127,000 and this case was litigated 8 years ago.

CONCLUSION

Applying the Aetna factors, and the Banker factors, the circuit court judge and family court judge clearly erred and abused their discretion in not awarding a full or partial reimbursement to Ms.

Landis of attorney fees, expert fees and costs incurred by Ms. Landis for the prosecution of this divorce matter. The court clearly erred and abused in its discretion in finding that Ms. Landis received an award of substantial assets. The court clearly erred in finding that Ms. Landis had the ability to pay her own attorney fees and costs. Furthermore, the court clearly erred in finding that Ms. Landis received an award of substantial assets when Dr. Landis has failed to pay almost \$900,000 that was due and owing in December 2005 and Ms. Landis' other marital assets did not produce much income. The Court clearly erred and abused its discretion by finding that Ms. Landis had the ability to pay her own attorney fees when she is not employed and has not been for the last 15 plus years, her spousal support will terminate in less than 2 ½ years and she suffers from serious health problems which preclude her from earning an income. The circuit court and family court clearly erred in finding that Dr. Landis was making payments on a \$15,000 mortgage loan for Ms. Landis for prior attorney fees. Furthermore, the circuit court judge and family court judge erred in finding that Dr. Landis had paid \$1,500 to Barry Bruce for attorney services rendered to Ms. Landis. Therefore, Ms. Landis requests that this Court reverse the Order submitted by the Circuit Court Judge on July 20, 2006.

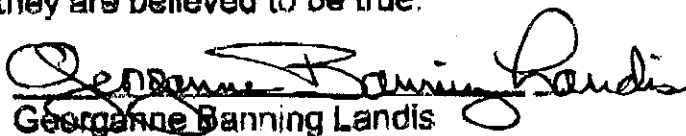
Georganne Banning Landis
By Counsel



Lyne Ranson, Esquire
WV State Bar No. 3018
Lyne Ranson Law Offices, PLLC
1528 Kanawha Boulevard, East
Charleston, WV 25311
(304) 344-2121

VERIFICATION

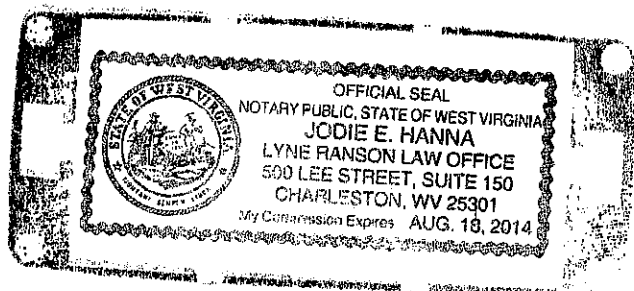
I, Georganne Banning Landis in the foregoing **MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S PETITION FOR APPEAL** being duly sworn, say that the facts and allegations contained therein are true, except insofar as they are therein stated to be on information, and that insofar as they are therein stated, they are believed to be true.

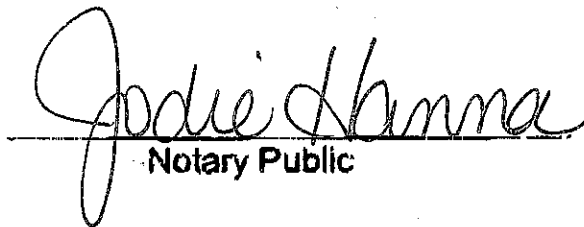

Georganne Banning Landis

Taken, subscribed and sworn to before me this 16th day April 2007.

My commission expires:

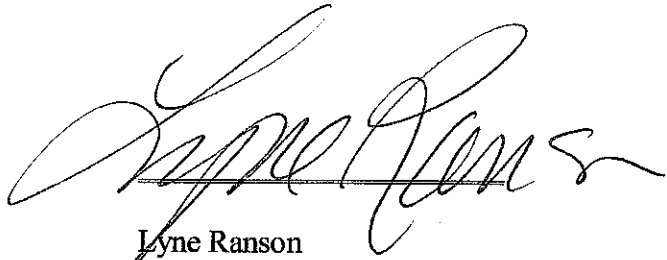
Aug. 18, 2014




Notary Public

CERTIFICATE OF ATTORNEY

The undersigned counsel for Georganne Banning Landis hereby certifies that the facts alleged in the Memorandum of Law in Support of Respondent's Petition for Appeal are faithfully represented and accurately presented to the best of my ability.

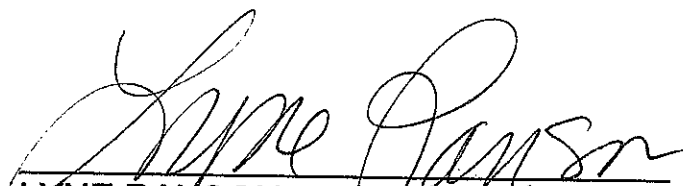
A handwritten signature in cursive script, appearing to read "Lyne Ranson", written over a horizontal line.

Lyne Ranson
WV State Bar No. 3018
1528 Kanawha Boulevard, East
Charleston, WV 25311
(304) 344-2121

CERTIFICATE OF SERVICE

I, Lyne Ranson, Counsel for Respondent, **Georganne Banning Landis**, do hereby certify that I have served a true and exact copy of the foregoing **Memorandum of Law In Support of Respondent's Petition for Appeal** following counsel of record by mail this **16th day of April, 2007** to the following:

C. Elton Byron, Jr., Esquire
108 Main Street
Beckley, WV 25801


LYNE RAMSON, ESQ. (SBN. 3018)
Lyne Ranson Law Offices, PLLC